No. 786

In the Supreme Court of the United States

OCTOBER TERM, 1957

WONG DOO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1923

WONG DOO, PETITIONER
v.
THE UNITED STATES OF AMERICA, RESPONDENT } No. 736

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT

This case comes before the Court upon a writ of certiorari issued to the United States Circuit Court of Appeals for the Sixth Circuit, to review a decree of that court affirming a decree of the District Court for the Northern District of Ohio (Eastern Division), which denied to Wong Doo, a Chinese alien, a writ of habeas corpus and remanded him to the custody of the immigration authorities for deportation to China. It has an extended history.

Wong Doo, the petitioner, landed at San Francisco on January 25, 1915. He was then about 15 years of age and gained admission upon the claim that he was the minor son of a Chinese merchant, Wong Sun, alleged to be then lawfully domiciled in the United States. In April 1915, in company with his father, Wong Sun, and his brother, Wong Fee, he moved to Cleveland, Ohio. There, on August 3,

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1915, the immigration officers found him, his father, brother, and one Chan Yim, living at a Chinese laundry, took them into custody and examined them. A number of the neighbors and customers of the laundry were also examined. From these statements it appeared that although the petitioner, Wong Doo, had for a time been attending a public school, his father and brother had been employed as laborers in the laundry. Other investigations were made and the information submitted to the Department of Labor, which issued a warrant of arrest for each of the four aliens, Wong Doo, Wong Fee, Wong Sun, and Chan Yim, in which each was charged with having been found in the United States in violation of the Chinese Exclusion Laws and the rules of the Secretary of Labor made in pursuance thereof, in that they had gained admission fraudulently.

Thereupon began the chain of litigation which has brought this case here. It consists of two deportation proceedings before the immigration officers and three habeas corpus proceedings in the District Court; and the principal question presented is whether the doctrine of *res adjudicata* applies to a judgment denying or dismissing a writ of habeas corpus, so that in the instant case the judgment rendered in the second habeas corpus proceeding precluded a consideration upon the third writ of those matters adjudicated in the second. For convenience we shall refer to these as the First and Second Deportation Proceedings and the First, Second, and Third Habeas Corpus Proceedings.

FIRST DEPORTATION PROCEEDING

On August 3, 1915, the petitioner and his associates were taken into custody and examined by the immigration officers under authority which they claimed to have by virtue of Section 21 of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898. A formal warrant of arrest was issued and served August 9. On August 10, 1915, a hearing was begun at which the aliens were represented by counsel. At their request the hearing was successively continued to August 23, to August 27, to January 15, 1916, and finally to January 17, 1916. Full opportunity was given to their counsel to examine the preliminary statements made by the aliens and other witnesses and to present any evidence in their behalf which might be pertinent. The record of this hearing, which was introduced in evidence in the Third Habeas Corpus Proceeding, has been filed with the Clerk of this Court in the form in which it was offered as an exhibit before the District Court. It comprises what has been designated by the Clerk as the "Second Section," the pages of which are numbered in red pencil from 1 to 81.

On April 5, 1916, the Secretary of Labor issued his warrant of deportation. Thereupon the petitioner presented a petition to the District Court for the Northern District of Ohio for a writ of habeas corpus, which inaugurated the

FIRST HABEAS CORPUS PROCEEDING

The record of this proceeding is not before the Court. It appears, however, from the opinions of the District Court (*Wong Sun* v. *Fluckey*, 283 Fed.

989) and of the Circuit Court of Appeals (*Wong Sun* v. *United States*, 293 Fed. 273, Transcript of Record, page 20), filed in the instant case, that in this first proceeding it was urged on behalf of the aliens that the Secretary of Labor had no jurisdiction to arrest, hear, or deport Chinese aliens for violation of the Chinese Exclusion Acts. Those Acts provided for a judicial hearing before a justice, judge, or commissioner of any United States court, while that afforded by the Immigration Act of 1907 was an administrative hearing before the immigration officers. It was contended that when a Chinese alien was charged with a violation of the Exclusion Acts he was entitled to the judicial hearing provided by those Acts. This was sustained in *United States* v. *Woo Jan*, 245 U. S. 552 (January 28, 1918), and in accord with that decision the petitioner was discharged from custody on March 28, 1918. (See also *Ex parte Woo Shing*, 226 Fed. 141; *United States* v. *Woo Jan*, 250 Fed. 595; and *Woo Shing* v. *Fluckey*, 250 Fed. 598.)

SECOND DEPORTATION PROCEEDINGS

Meanwhile the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874 (effective May 1, 1917), had been enacted, and on March 27, 1918, new warrants for the arrest of the petitioner and his associate were issued by the Secretary of Labor under authority of Section 19 of that Act. These warrants charged (R. 8):

> That he has been found within the United States in violation of rule 9, Chinese rules,

> and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes.

They were taken into custody on April 2, 1918, and on April 16 a hearing was begun at which the petitioner was again represented by counsel. At the outset the immigration inspector notified the aliens that the testimony and exhibits taken in the First Deportation Proceeding would be introduced in evidence, and a copy of them furnished to counsel. Counsel for the aliens requested a continuance which was granted, and a final hearing was held on September 17, 1918. The record of this hearing has also been filed with the Clerk of this Court and has been designated as "Section 1," comprising that portion which is numbered in blue pencil.

At this hearing counsel for the aliens demanded that the inspector produce for cross-examination the witnesses whose statements had been introduced in the First Deportation Proceeding. The inspector stated that all but one or two were residents of Cleveland whose presence could be readily obtained if the aliens were willing to pay the witness fees; that he disliked to summon them from their work without paying them; and that the Department had no funds for such purpose; but that he would issue subpoenas if the aliens would pay the fees. Counsel for the aliens declined. The inspector then offered to go with the aliens to the respective homes or places of

employment of the several witnesses, and to take their testimony upon cross-examination so that the payment of witness fees would be unnecessary. Counsel for the aliens refused to do this, and those witnesses were not cross-examined. The inspector also offered to arrange for the cross-examination of the one or two witnesses who resided outside of Cleveland, and to give the aliens an opportunity to verify the results of investigations made by immigration officers in California. These offers were also declined. (See Record on file with the Clerk, First Section, page 10.) The hearing was concluded and on June 15, 1920, the Secretary of Labor issued a warrant for deportation. (R. 9.)

SECOND HABEAS CORPUS PROCEEDING

On June 29, 1920, the petitioner sought a writ of habeas corpus from Judge Westenhaver, of the District Court for the Northern District of Ohio, upon two grounds: (1) That as he had entered the United States before May 1, 1917, he was entitled to the judicial hearing provided by the Chinese Exclusion Acts, and could not be arrested, heard, or deported by the immigration officers under Section 19 of the Immigration Act of 1917; and (2) That the hearing accorded him by the immigration officers "was manifestly unfair and not impartial to this petitioner, but, on the contrary, was examined on several occasions by said J. Arthur Fluckey and his assistants, without the privilege of counsel, and found by said Fluckey to be unlawfully in the United States, solely from the testimony of witnesses, cross-examination

of whom was not had by your petitioner's counsel." (See *Wong Sun* v. *Fluckey*, 283 Fed. 989,990, and Transcript of Record p. 21, note 1.) The return (1) denied the petitioner's right to a judicial hearing and (2) denied generally and specially all allegations of unfairness. (*Wong Sun* v. *Fluckey*, 283 Fed. 989, 990, and Transcript of Record, page 21, note 2.)

At the hearing upon this petition and return on November 3, 1920, the departmental record upon which the order of deportation was based was not offered in evidence (R. 12, 13) nor was any proof offered to sustain the charge that the hearing had been unfair (R. 22). There is no doubt that counsel then relied most strongly upon the jurisdictional question raised, and there being no evidence upon the question of alleged unfairness the court did not seriously consider it.

On December 14, 1920, the District Court denied the writ, and an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit. After the appeal was argued, but before it was disposed of, this Court delivered its opinion in *Ng. Fung Ho* v. *White*, 259 U. S. 276 (May 29, 1922), in which it held that the Immigration Act of 1917, unlike the prior act of 1907, did give the Secretary of Labor authority to arrest, hear, and deport Chinese aliens who were thereafter found to be in the United States in violation of the Exclusion Acts. The Circuit Court of Appeals then affirmed the decree of the District Court in an opinion delivered June 28, 1922, which is reported under the name of *Woo Shing* v.

United States, 282 Fed. 498. The mandate was filed on August 3, 1922 (R. 11) and thereupon the petitioner instituted this, which is the

THIRD HABEAS CORPUS PROCEEDING

The petition filed August 8, 1922, averred that the First Deportation Proceeding was unfair (and, we assume, wanting in due process), that there was no competent evidence to sustain an order of deportation, and that the petitioner was legally entitled to remain in the United States (R. 2, 3). It made no reference whatever to the Second Deportation Proceeding nor to the Second Habeas Corpus Proceeding. The return recited briefly the facts concerning the prior proceedings and averred that the hearings had in all respects been fair, just, and regular, and that the immigration officers had in no wise exceeded or abused their discretion (R. 5–7). Shortly afterward an amended return was filed which denied the allegations of unfairness with more precision, and set out in greater detail the facts of the Second Habeas Corpus Proceeding, showing that all of the present issues had then been raised and that the judgment in that case precluded the present inquiry upon the doctrine of *res adjudicata* (R. 10–11). The petitioner filed a reply in which he insisted that *res adjudicata* did not apply because (1) the present issues had not heretofore been considered or decided and (2) the doctrine of *res adjudicata* does not apply to a judgment denying or discharging a writ of habeas corpus. (R. 12).

The record in the Second Habeas Corpus Proceeding was attached to the amended return as "Exhibit C" (R. 11) and at the hearing the petitioner offered in evidence the departmental records of the First and Second Deportation Proceedings. (See Stipulation, R. 17.)

On October 6, 1922, the District Court denied the writ and remanded the petitioner to the custody of the immigration officers (R. 14; *Wong Sun* v. *Fluckey*, 283 Fed. 989). Upon appeal to the Circuit Court of Appeals that court on November 12, 1923, affirmed the decree of the District Court (R. 20; *Wong Sun* v. *United States*, 293 Fed. 273).

The questions now presented to the Court are:

1. Does the doctrine of *res adjudicata* apply to a judgment denying a writ of habeas corpus?

2. If it does not, then was the petitioner entitled to be discharged upon the record before the District Court?

ARGUMENT

I

Res adjudicata applies to a judgment denying or dismissing a writ of habeas corpus

The petitioner's first objection to applying the doctrine of *res adjudicata* is that the question whether he had been deprived of due process of law was not considered or decided by the court in the former proceeding. It is clear, however, from the opinions of the District Court (*Wong Sun* v. *Fluckey*, 283 Fed. 989, 990), and of the Circuit Court of Appeals (R.

20, 21, notes 1 and 2), that this issue was clearly and distinctly raised by the pleadings in the former case, and upon well settled authority the former judgment is a final and conclusive adjudication not only of the matters emphasized by counsel in argument and discussed in the opinion of the court, but also of all matters which might have been so considered and decided. (*Black on Judgments*, 2d. Ed., Vol. 2, § 613; *New Orleans* v. *Citizens Bank*, 167 U. S. 371, 398; *So. Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48.) Accordingly the petitioner can hope to prevail here only upon the broad ground that the doctrine of *res adjudicata* does not apply to a judgment denying or dismissing a writ of habeas corpus.

We recognize that this was indeed the rule at common law in the case of one held on a criminal charge, and an unsuccessful petitioner for the writ might apply in turn to every available court or judge in the realm. But in this, as in the case of many other rules of the common law so jealous of the liberty of the subject, the reasons upon which it was founded belong to an age that is past and have since ceased to exist. They were two: (1) At common law the facts stated in the return to the writ were taken as true, and the hearing was summary and without opportunity to frame and try issues of fact; and (2) No right of review by writ of error or appeal existed. The right to successive writs was a sort of imperfect substitute for that of review in an appellate tribunal. However, the statutes and the practice in the Federal courts now provide that the

return may be traversed, the court may hear and determine issues of fact, and its judgment may be reviewed upon writ of error or appeal. And with the complete disappearance of the reasons, this rule of the common law, which stood as a striking exception to the otherwise universal application of the doctrine of *res adjudicata*, was abrogated. *Cessante ratione legis cessat et ipsa lex.* No statute setting aside the rule was necessary; those which removed the reasons for the rule were sufficient. (*State ex rel. Durner* v. *Huegin*, 110 Wis. 189, 226.)

Moreover, it is doubtful whether the rule at any time was applicable to a proceeding of this character. The primary issue involved is that of the petitioner's status. It is analogous to that of a proceeding to determine the right of custody of an infant or the sanity of an insane person, to which the doctrine of *res adjudicata* is uniformly held to apply. (*Wong Sun* v. *Fluckey*, 283 Fed. 989, 994–995.)

While the question has not heretofore been considered or decided by this court, the able discussion and review of the cases made by Judge Westenhaver of the District Court (283 Fed. 989) and by Judge Knappen of the Circuit Court of Appeals (R. 20) render any further discussion of it in this brief an unwarranted trespass upon the time and attention of this Court. We confidently rest upon the reasoning of those opinions, and in the language of Judge Westenhaver we submit that—

> In view of the protracted efforts of the United States immigration authorities to ex-

clude this petitioner from the United States, and his hitherto successful efforts in opposition, these propositions are somewhat startling and should not be sustained unless such is clearly the law (283 Fed. at p. 992).

* * * * *

Aside from the change of law resulting from the granting of a right of review, the reasons for the common law rule permitting repeated applications in habeas corpus cases have so far failed or have so little pertinency in the present situation that it would be little short of absurd to apply that rule and permit the petitioner to vex other judges of this district, or other districts and Circuit Courts of Appeal of this circuit or other circuits, with new applications to retry what has or may be determined by this court and reviewed by the Circuit Court of Appeals. (Id. p. 994.)

II

The petitioner was not entitled to be discharged

If the District Court had considered the petition upon its merits, its decision would not have been different. The petitioner was not entitled to be discharged. While the averments of the petition and the assignment of errors do not set forth clearly the legal grounds upon which counsel believe the petitioner should be discharged, we understand the contention to be that the hearing by the immigration officers in the Second Deportation Proceeding was such that by the order of deportation based thereon he will be deprived of his liberty without due process of law. The specific objections are that there were

introduced in evidence at that hearing (1) statements made by the petitioner and his associates before they were formally arrested and without their being first advised of their right to have counsel, (2) statements made by witnesses who were not produced by the immigration inspector for cross-examination by the petitioner, and (3) certain letters and papers taken from the clothing and effects of the petitioner's associates at the time of their arrest.

As to the statements made by the petitioner prior to his arrest, the recent decision of this Court in *Bilokumsky* v. *Tod*, 263 U. S. 149, 155–156, is conclusive. They were freely made by the alien and might properly be considered as evidence upon the hearing.

It is true that there were introduced in evidence statements made by others who were not cross-examined by the petitioner. But, as we pointed out in the opening statement, the inspector offered to go with counsel for the alien to the several homes or places of business of these witnesses and to incorporate in the record their cross-examination. Counsel declined the offer, choosing to stand upon the highly technical ground that it was the inspector's duty to bring the witnesses to the place of hearing. Under these circumstances cross-examination of these witnesses was not denied but waived. (See report of proceedings on file with the Clerk, Section 1, pages 4 and 11 numbered in blue pencil.)

As to the documents introduced. Conceding *arguendo* that they were obtained by an unlawful search

and seizure and that the rule of *Boyd* v. *United States*, 116 U. S. 616, is applicable to a proceeding of this character, still it will be found from an examination of the record on file with the Clerk that these documents were not found among the effects of the petitioner, but of his father Wong Sun. They would not, therefore, be inadmissible against him. (*Wilson* v. *United States*, 221 U. S. 361; *Dreier* v. *United States*, 221 U. S. 394; *Haywood* v. *United States*, 268 Fed. 795.) If they were excluded, however, there would still remain sufficient evidence in the record to support the order of deportation and to show that there was no such hasty, arbitrary, or unfair action or abuse of discretion by the immigration officers and the Secretary of Labor as would amount to depriving the alien of due process of law. (See *United States ex rel. Tisi* v. *Tod*, No. 132, Oct. Term, 1923, decided Feb. 18, 1924, and cases there cited.)

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

GEO. ROSS HULL,
Special Assistant to the Attorney General.

APRIL, 1924.

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